

**Five Legal Limits on Local Government Budgets  
in  
The Taxpayer's Bill of Rights (TABOR, Article X, Section 20, Colo. Const.)  
and  
the “5.5%” Annual Levy Law (29-1-301, C.R.S.)**

**There are three limitations on each local government’s property tax, two of which are in TABOR:**

- 1. Mill Levy:** Voter approval in advance is required for any **mill levy increase**. [TABOR (4)(a)]
  - < A refund and abatement levy is not an increase in tax revenue, and therefore can be imposed outside of this limit. *Bolt v. Arapahoe County School District Number Six, a/k/a Littleton Public Schools*, 898 P.2d 525, 534 (Colo. 1995)
  - < Elections, which authorized unlimited mill levy increases, (i.e., Pre-TABOR general obligation debt), continue to authorize such increases without further voter approval. *Bolt* (supra)
  - < The most common interpretation of this limit is that a declining assessed valuation may mean less property tax revenue. An alternative interpretation, supported by language in the Bolt and Havens cases, is that only increases in tax rates, *which result in increases in revenue* need to be voted upon. (See the DLG research paper “TABOR, Gallagher and Mill Levies” for a lengthy discussion of this.)
  - < A technique, which many local governments have adopted to deal strategically with this limit, is to use a Temporary Property Tax Credit (39-1-111.5, C.R.S.) to prevent permanently lowering the mill levy when other limits (below) may require the mill levy to be lowered.
- 2. TABOR Property Tax Revenue Limit:** The maximum allowable percentage increase in any district's **property tax revenue** is “inflation in the prior calendar year” plus “annual local growth.” [TABOR (7)(c)]
  - Inflation [TABOR (2)(f)]:
    - < Annual percentage change in the Denver-Boulder Consumer Price Index (CPI).
    - < CPI is not released until about March 1 of the following year. Projections for the current year from reliable sources will be available from DLG in late March, June, September and December.
    - < CPI for 2005 was **2.1%**. OSPB & Legislative Council projections for 2006 are **3.4 %** and 3.5%, respectively, as of the 3<sup>rd</sup> quarter 2006. The Bureau of Labor Statistics actual Mid-Year CPI of July 05 to June 06 is 3.8%.
  - Local Growth [TABOR (2)(g)]:
    - < The net percentage change in actual value of all real property from construction of taxable real property improvements, minus destruction of similar improvements, and additions to, minus deletions from, taxable real property.
    - < The County Assessor provides the data needed to perform these calculations by August 25 of each year. **NOTE:** “all real property” does not include government-owned property.
    - < For school districts, “local growth” is the percentage change in student enrollment.
- 3. The “5.5%” Property Tax Revenue Limit:** this is another limitation on the property tax line item in each local government budget. It is called the “Annual Levy Law” [29-1-301, C.R.S.], and requires that levies be lowered to prevent levying more revenue than a
  - < 5.5% increase from the prior year, and
  - < an additional amount for new construction, annexations/inclusions and other new property.
  - < It is possible to increase this limit for “**capital expenditures**” by governing board action without an election, by publishing a notice of a public hearing [29-1-301(1.2), C.R.S.]

- < If the capital expenditures are for County Road & Bridge purposes, it is possible to secure a waiver from the Division of Local Government of the mandatory municipal share back requirement [29-1-301(1.2)(b), C.R.S.]
- < If an increase in “oil & gas production” is experienced, it is possible to treat this as “new property” under this limit by initiating an application process through the Division of Local Government, which, if successful, will allow an additional increase in the “5.5%” limit [29-1-301(1)(b), C.R.S.]
- < This limitation on levy and revenue reflects the pre-TABOR property tax system, in which levies could be raised in any year to assure property tax as a regular source of revenue.

**NOTE:** these three limitations must operate in conjunction with each other. They are commonly harmonized by considering the limit, which produces the lowest revenue to be the limiting factor, precluding levying any revenue that may be allowed under the other two limits. DLG has developed a Property Tax Revenue Calculation Worksheet [DLG 53a] to assist in reconciling these three limitations.

**4. Fiscal Year Spending** This fourth budget limitation is on all annual TABOR non-exempt revenue.

- < The maximum percentage increase allowed in a district's "**fiscal year spending**" (FYS) is “inflation in the prior calendar year” plus “annual local growth,” adjusted for revenue changes approved by the voters. [TABOR (7)(b)]
  - "FYS" is defined [TABOR (2)(e)] as all expenditures and reserve increases except
    - a. Refunds made in the current or next fiscal year
    - b. Gifts
    - c. Federal funds
    - d. Collections for another government
    - e. Pension contributions by employees and pension fund earnings
    - f. Reserve transfers or expenditures
    - g. Damage awards
    - h. Property sales, and
    - i. Conservation Trust Fund distributions and other Great Outdoors Colorado Funds. *Submission of Interrogatories on SB 93-74*, 852 P.2d 1, 11-12 (Colo. 1993)
- < A “reserve” in its simplest form is any carry-forward or beginning balance
- < FYS operates as an overall revenue limitation for three reasons:
  - ❑ FYS includes all expenditures and reserve increases.
  - ❑ The exemptions (a through i, above) are mostly revenue sources.
  - ❑ TABOR (7)(d), which requires a refund of excess FYS, includes a number of references to revenues

**5. Debt limitation** (this TABOR limit on debt may not arise in each annual budget):

- < requires voter approval in advance for the “creation of any multiple fiscal year direct or indirect district debt or other financial obligation whatsoever...” [TABOR(4)(b)]
- < Exceptions are
- < refinancing district bonded debt at a lower interest rate
- < adding new employees to the district's pension plan
- < pledging adequate present cash reserves irrevocably, to be held for payment in all future fiscal years
- < "Debt" and "financial obligation" retain pre-TABOR case law definitions.
- < Does not include leases with annual appropriation requirements. *Board of County Commissioners of Boulder County v. Dougherty, Dawkins, Strand & Bigelow Inc.*, 890 p.2d 199, 207 (Colo. App. 1994)

- Applies to Revenue Bonds (except enterprises - see below). *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 870 (Colo. 1995)

### **Key Terms and Issues to understand when managing within these limits:**

**Enterprises** The provisions of TABOR apply to each "district," which is defined as "the state or any local government excluding enterprises." [TABOR (2)(d)]

- < There is not a definition in TABOR of "local government."
- < The definition of "enterprise" is not the same as that which is used under Generally Accepted Accounting Principles. Therefore, a TABOR enterprise is not simply a separate fund in a governmental accounting system; it has to meet three tests [(2)(d)]:
  1. A government-owned business:
    - B an activity conducted in the pursuit of a benefit, gain, or livelihood. *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 868 (Colo. 1995)
    - B the power to unilaterally impose taxes is inconsistent with the characteristics of a business, whether taxes are actually imposed or not. *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 869 (Colo. 1995)
    - B the *district* and the *enterprise* which it "owns" must be separate entities.
  2. Authorized to issue its own revenue bonds.
    - B A "water activity enterprise" (water, sewer or drainage) can satisfy this test by being able to issue bonds through its governing body. 37-45.1-104(1), C.R.S.
  3. Receives less than 10% of annual revenue in grants from all Colorado state and local governments combined.
    - B Definition of "grant" has not been completely resolved for local governments. There are two contemporaneous interpretations:
      - For "Water Activity Enterprises" a grant does not have to be repaid, and does not apply to payments for provision of services, and [37-45.1-102(2), C.R.S.]
      - In State fiscal policy, a grant is a "direct cash subsidy." [24-77-102(7), C.R.S.]

**NOTE:** the Colorado Court of Appeals has stated that an enterprise can be created by a governing board's "implied powers ... reasonably necessary to the execution of expressly delegated or conferred powers." *Board of Eagle County Commissioners v. Fixed Base Operators*, 96CA1042, April 3, 1997  
This appears to authorize the establishment of local enterprises for purposes such as golf courses and other fee-based services, in the absence of specific statutory authority.

**Reserves** There are two types of reserves provided for in TABOR:

- < Emergency Reserves are to be used "for declared emergencies only," and are defined as 3% of Fiscal Year Spending (excluding bonded debt service). TABOR(5)
- < "Emergency" excludes: economic conditions, revenue shortfalls, or salary or fringe benefit increases. TABOR (2)(c)
- < General reserves, used in the definition of FYS. [TABOR(2)(e)]
- < These reserves are sometimes viewed as being the equivalent of "fund balances" in the Local Government Budget Law.
- < Reserves are usually designated as such by an action of the governing board or council. (**NOTE:** this is not the same term as "reserve" under Generally Accepted Accounting Principles.)

### **Penalties**

Under TABOR, if revenue is collected which causes the district to exceed the limits on FYS or TABOR property tax revenues, the excess must be refunded in the next fiscal year unless the voters approve a

“revenue change.” TABOR (7)(d)

- < Revenue collected, kept, or spent illegally since four full fiscal years before a suit is filed must be refunded with 10% annual simple interest. TABOR (1)
- < Governments may use any reasonable method for refunds, including temporary tax credits and rate reductions. TABOR (1)
- < Refunds need not be proportional when the excess revenues are impracticable to identify or return. TABOR (1)

Under the “5.5%” limitation, if revenue is levied in excess of the limit, the Division of Local Government must order a reduction in the subsequent year’s mill levy as an offset. [29-1-301(6), C.R.S.]

## Elections

TABOR-related ballot issues can be held at an election in any November or on a district’s regular “biennial local election.” TABOR (3)(a)

- Elections are coordinated by the County Clerk & Recorder every November.
  - Coordinated elections require specific deadlines to be met, some of which are as early as July
  - All local governments except school districts may opt-out of coordinated elections by conducting their own “mail ballot” elections
- Districts may consolidate elections. TABOR (3)(a)
- < Voters can approve a delay of up to four years in voting on ballot issues. TABOR (3)(a)
- < Actions taken during that delay shall not extend beyond that period
- < It is not clear to what level the revenue base returns when such a period lapses
- < A number of “debrucing” elections have secured voter approval for specific actions for an open-ended period of time
- < Specific notice must be mailed to each address in the district where a registered voter resides, 30 days before the election. TABOR (3)(b)
- < Must be mailed as a package in coordinated elections (3)(b)
- < Must include:
  - B Election date, poll hours, ballot title, and local election office & phone number. (3)(b)(i)
  - B Fiscal Year Spending for the current year and each of the past four years, the overall percentage and dollar change. (3)(b)(ii)
  - B Estimates of the maximum dollar amount of the tax and spending increase proposed, and of spending without the increase. (3)(b)(iii)
  - B For proposed bonded debt, the principal amount and maximum annual and total repayment cost, as well as the principal balance of the total current debt and its maximum annual and remaining total repayment cost. (3)(b)(iv)
  - B Summaries of up to 500 words for and against the proposal. (3)(b)(v)

The “5.5%” limitation also allows an election to be held to increase the mill levy for revenue in excess of the limit. **Care must be taken to specifically address the limitations of the five listed above in the wording of a ballot issue.** “Debrucing” elections usually deal with “fiscal year spending” limits, gaining approval to keep and spend either certain revenues or all revenues. Often more than one issue will be combined into one question (i.e., a bond issue, property tax increase to redeem the bonds, and a fiscal year spending increase to accommodate the increased revenue. The Attorney General has interpreted the law to mean that such elections can “debruce” the “5.5%” property tax limitation, and permanently remove that limit from application to the local government [Attorney General’s Opinion #99-5]. Thus, the “5.5%” limit can be changed by the voters similar to the way that “Debrucing” elections have treated the TABOR limitations.